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EPA Repeals Obama-Era CPP, Finalizes Narrow ACE Replacement GHG Rule

Posted June 19, 2019

The Trump EPA has finalized its Affordable Clean Energy (ACE) rule, a narrow policy intended to address greenhouse gases from existing power plants, while also formally repealing the Obama-era Clean Power Plan (CPP) in the agency's first high-profile climate rule rollback to be completed.

EPA Administrator Andrew Wheeler signed the final rule June 19.

The rule, which largely relies on the current industry trajectory away from coal toward lower-emitting natural gas and renewables, is prompting swift criticism from those pressing for strong climate action.

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D.C. Circuit Boosts EPA's Policy On Limited Review Of Title V Air Permits

Posted June 14, 2019

A federal appeals court has dismissed environmentalists' suit over an EPA policy shift that bars the agency from "second-guessing" states' Clean Air Act Title V permit decisions, boosting the policy in the short-term although the court rejected the suit on procedural grounds so a future lawsuit could still challenge the policy's merits.

In a unanimous June 14 opinion in *Sierra Club v. EPA, et al.*, the U.S. Court of Appeals for the District of Columbia Circuit rejects the suit on the grounds that EPA's policy is not "nationally applicable," and hence venue is not correct in the D.C. Circuit. The decision leaves Sierra Club to contest the policy in the 10th Circuit, where a parallel suit has been

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EPA Drops Appeal Of Stormwater Suit, Teeing Up Expansion Of Permits

Posted June 14, 2019

EPA has quietly withdrawn its appeal of a federal district court's order that backed environmentalists' petition to expand the universe of facilities subject to Clean Water Act (CWA) stormwater discharge permits, signaling that it will move to comply with the order though officials have made no formal statement on how they plan to proceed.

The agency announced it was voluntarily dropping the case, *Blue Water Baltimore, et al., v. Wheeler*, through a June 6 filing with the U.S. Court of Appeals for the 4th Circuit. That means the district court order limiting EPA's discretion on when to invoke its little-used CWA residual designation authority (RDA) will stand — albeit without setting a

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Utilities Provide Cautious Response To Senate PFAS Bill Ahead Of Markup

Posted June 18, 2019

Drinking water utilities are declining to take a position on bipartisan Senate legislation addressing contamination from perfluorinated chemicals through a variety of environmental laws, though they are concerned that the measure, slated for markup June 19, could set an adverse precedent by preempting EPA's statutory process for setting standards.

The utilities in a June 18 letter to Sens. John Barrasso (R-WY) and Tom Carper (D-DE) say they applaud the bipartisan efforts of the chairman and ranking member of the Environment and Public Works Committee (EPW) to address per- and polyfluoroalkyl substances.

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EAB Backing Of EPA's Deferral To States Raises Bar For CWA Permit Suits

Posted June 18, 2019

A new ruling from EPA's Environmental Appeals Board (EAB) sets a high bar for litigants to overcome deference to a state's interpretation of ambiguities in its own Clean Water Act (CWA) permitting rules, holding that Idaho environmentalists fell far short of the standard in their challenge to a CWA discharge permit.

EAB's June 13 decision in the case *In re: City of Sandpoint Wastewater Treatment Plant* upholds an EPA-crafted CWA discharge permit for the Idaho city's wastewater plant, against the Idaho Conservation League's (ICL) claims that its terms violate the "plain meaning" of state water regulations.

The panel of Judges Mary Kay Lynch, Kathie A. Stein and Mary Beth Ward write that the group has failed to establish the "plain meaning" of the rules at all, and therefore cannot prove that EPA committed a clear error in writing the permit, especially since its interpretation agrees with Idaho's.

"At very best, the League may have shown through its argument on the meaning of the regulatory text that there may be more than one plausible interpretation of the regulation. But as previously noted, demonstrating that a regulation has more than one plausible interpretation 'falls far short' of showing that the Region clearly erred in accepting a state's interpretation of its regulation," Stein writes for the unanimous panel.

She emphasizes that EPA's position is bolstered by the fact that it was relying on the Idaho Department of Environmental Quality's (DEQ) own reading of rules that govern "mixing zones" where a facility can release high concentrations of pollution in order to blend them into a larger waterbody, ultimately reaching safer levels.

"In examining whether the Region clearly erred in accepting Idaho DEQ's interpretation of its mixing zone regulation, we note that the Region relied on Idaho DEQ's explanation of how it interpreted the regulation, the longstanding nature of Idaho DEQ's interpretation of the rule, and the fact that the Region had acknowledged Idaho DEQ's interpretation when it approved the regulation in 1996," Stein writes.

At issue in the case is EPA's National Pollutant Discharge Elimination System (NPDES) permit for Sandpoint, which includes a mixing zone that takes up as much as 60 percent of the nearby Pend Oreille River. ICL says that term clearly violates a list of factors regulators must "consider" in crafting CWA permits, including that mixing zones should be no more than 25 percent of a waterbody.

But the EAB panel says it is at best unclear whether requiring NPDES permit writers to "consider" that factor means they are legally required to follow it. Stein's opinion spends nine pages analyzing the meaning of the word in context, and concludes only that is uncertain.

"Here, the meaning of the pertinent regulation is ambiguous, not plain," she writes.

401 Certifications

However, Stein rejects DEQ's separate argument that EAB has no jurisdiction to even consider the application of the rule to an individual permit, because the state formalized its reading of the mixing-zone rule in its CWA section 401 certification that EPA-crafted CWA permits satisfy Idaho's laws and regulations.

Section 401 of the water law gives states broad authority to put new conditions on federal CWA permits in order to ensure compliance with their own policies — although the Trump administration is working to limit states' discretion to do so.

In a footnote to her opinion, Stein writes that DEQ ignored "a long line" of precedent to the contrary when it argued that EAB has no authority to review permits crafted under the terms of a section 401 certification.

"Idaho DEQ does not confront a long line of Board and pre-Board cases that have held that EPA has an independent responsibility under the Clean Water Act to review challenges to state certifications in which the petitioner argues that the conditions in the state certification are insufficient to meet state law," she writes. — *David LaRoss* (dlaross@iwpnews.com)

SUBSCRIPTIONS:
703-416-8500 or
800-424-9068
custsvc@iwpnews.com

NEWS OFFICE:
703-416-8536
Fax: 703-416-8543
inside-epa@iwpnews.com

Publisher: Jeremy Bernstein (jbernstein@iwpnews.com)
Chief Editor: Anthony Lacey (alacey@iwpnews.com)
Senior Correspondent: Dawn Reeves (dreeves@iwpnews.com)
Associate Editor: David LaRoss (dlaross@iwpnews.com)

Production Manager: Lori Nicholson (lori.nicholson@iwpnews.com)
Production Specialists: Daniel Arrieta, Michelle Moodhe

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OMB Reviewing Army Corps' New CWA Section 401 Guidance For States

Posted June 18, 2019

The White House Office of Management and Budget (OMB) is reviewing new Army Corps of Engineers guidance on when states can take longer than 60 days to act on a request for a Clean Water Act (CWA) section 401 water quality certification for dredge-and-fill permits — part of the Trump administration's push to hasten permitting decisions.

OMB received the guidance, "Time Frames for Clean Water Act Section 401 Water Quality Certifications and Clarification of Waiver Responsibility," June 17, according to OMB's website. Interagency review typically takes 90 days but can take longer or shorter depending on the issue.

The Corps guidance comes as EPA has issued new guidance limiting states' powers to review federally approved permits under section 401, setting tight timelines for completing the reviews and warning officials against blocking or restricting projects for any reason other than its direct water quality impacts.

President Donald Trump in an April 10 executive order mandated the new EPA, the first part of a two-step process that also includes a rulemaking expected by Aug. 7.

Assistant Secretary of the Army for Civil Works R.D. James issued a memorandum in December setting 60 days as a "default timeframe for a state's decision" under CWA section 401 on whether to certify Corps' dredge-and-fill permits and directing Corps district officials to allow extensions only in "special circumstances."

The memorandum also required the Corps to "immediately draft guidance" to establish criteria for Corps district engineers to identify the circumstances that may warrant additional times for states to act.

State water regulators have warned there will be a "vast increase" in the number of 401 certification denials for federal permits for pipelines and other projects — effectively blocking them — if their reviews are limited to 60 days in most cases.

While current Corps regulations already have a 60-day limit for reviews, it has been standard practice for district engineers to give states an entire year, the maximum time allowed under section 401, to act on a request for water quality certification, the memorandum said. James said factors such as the type of proposed activity and complexity of the site may be factors that allow for more than 60 days of review, but state workload, resource issues or lack of information would not be valid reasons for an extension.

Trump Executive Order Could End Host Of EPA Advisory Committees

Posted June 14, 2019

Key EPA advisory committees governing air quality policy, children's health, environmental justice and environmental finance are among more than a dozen facing elimination after President Donald Trump issued an order requiring EPA and other agencies to disband one-third of their federal advisory committees (FACs) by Sept. 30.

The June 14 executive order applies to panels agencies have created under the Federal Advisory Committee Act (FACA) of 1972, as well as those that are governed by FACA but authorized by another law.

That could include several EPA advisory panels which have been created under agency authority, including the Clean Air Act Advisory Committee, the National Environmental Justice Advisory Council, the Children's Health Protection Advisory Committee, the Environmental Finance Advisory Board and the Board of Scientific Counselors.

But the administration is also seeking advice from agencies on eliminating advisory panels required by law and is requiring the director of the Office of Management and Budget (OMB) to ask Congress to repeal some of those statutory provisions in the administration's fiscal year 2021 budget request.

That could mean panels such as the Science Advisory Board (SAB) and the Clean Air Scientific Advisory Panel (CASAC), which have already faced controversy as the Trump EPA has moved to scale back their roles and limit their memberships, could be targeted for elimination.

For example, after EPA eliminated a special CASAC panel tasked with reviewing the science underlying the agency's particulate matter (PM) policies, the remaining panelists asked EPA to recreate the PM panel because they lacked adequate expertise.

Similarly, the agency has clashed with SAB over the board's review of pending EPA rulemakings.

Trump's order requires agencies to "evaluate the need" for each of its current advisory committees established under section 9(a)(2) of FACA, as well as those advisory panels that are established under FACA but that are authorized by law.

It requires that by Sept. 30, agencies "terminate at least one-third of its current committees established under section 9(a)(2) of FACA."

FACA section 9(a)(1) states that no committee can be established unless it is authorized by statute or the president, while section 9(a)(2) or allows for the establishment of panels if the head of an agency deems it "to be in the public interest in connection with the performance of duties imposed on that agency by law."

The order notes that an agency may request a waiver from the requirement to terminate one-third of its advisory committees from the OMB director, who may grant such waivers "if the Director concludes it is necessary for the delivery

of essential services, for effective program delivery, or because it is otherwise warranted by the public interest."

By Aug. 1, the head of each agency must provide the OMB director with "a recommendation for each of the agency's current advisory committees established by the President under section 9(a)(1) of FACA regarding whether the committee should be continued; and a detailed plan, for each advisory committee required by statute, for continuing or terminating such committee, including, as appropriate, recommended legislation for submission to the Congress."

By Sept. 1, the OMB director "shall make appropriate recommendations to the President about terminating committees established by the President under section 9(a)(1) of FACA. The Director shall also include in the President's FY 2021 budget submission to the Congress a detailed plan for terminating such committees required by statute whose continued operations no longer serve the public interest."

The order further directs the OMB director to issue "instructions regarding the implementation of this order, including how to calculate the number of eligible committees to eliminate in each agency."

In the future, the order caps the total number of "eligible" FACs government-wide at 350. Should an agency wish to establish a new panel that would exceed the cap, it must obtain a waiver from the OMB director.

According to the General Services Administration, EPA has 22 active advisory committees, of which eight are required by statute, such as CASAC, SAB, the Scientific Advisory Panel which reviews pesticide issues and the Scientific Advisory Committee on Chemicals, which was established by the revised Toxic Substances Control Act (TSCA).

Vehicle GHG Hearing Likely To Flag Rollback's Job Cuts, GHG Increase

Posted June 18, 2019

The House Energy & Commerce Committee's upcoming hearing on the Trump administration's vehicle greenhouse gas and fuel economy rule rollback is poised to highlight the rule's potential harm to the economy, consumers and the climate, adding to a barrage of prior criticism of the plan's claimed safety and other benefits.

While a final witness list for the June 20 hearing has not been released, sources and reports indicate the joint hearing by the committee's environment and consumer protection panels will give lawmakers a chance to query EPA air chief Bill Wehrum, National Highway Traffic Safety Administration (NHTSA) Deputy Administrator Heidi King and potentially California Air Resources Board Chairwoman Mary Nichols about the implications of the plan.

Given the likely witnesses, the hearing will also allow Trump officials and Republicans to defend the vehicle proposal, which is slated to be completed in the coming months. It is expected to nearly freeze standards at model year 2020 levels through MY26, while also blocking California and other states from enforcing stricter GHG limits.

The federal officials could face tough questions on issues such as objections to the proposal's supporting assumptions from EPA staff; recent efforts by major automakers to distance themselves from the plan; and state objections to the Trump administration's attack on their vehicle programs.

Republican members inclined to support the Trump administration may also ask questions critical of California's vehicle program or aimed at playing up the cost to consumers of fuel economy technologies.

A June 17 background memo for the hearing from Energy & Commerce Committee staff leads off its discussion of the proposal's effects with EPA and NHTSA's own estimates that the regulation would eliminate 60,000 direct jobs in the automotive sector — referring to an estimate of the rule's long-term impact.

It also cites both Trump administration and independent estimates of the proposed rule's impacts, including a projection in the rule text that the plan would boost cumulative GHG emissions by 873 million metric tons over the lifetime of vehicles manufactured through model year 2029, increase fuel consumption by nearly 80 billion gallons, and increase sulfur dioxide and particulate matter emissions. Other studies have claimed higher environmental impacts, including increases in criteria pollutant emissions, from the plan.

The memo also cites several independent analyses of the proposal, including a Rhodium Group study describing increases in oil consumption and increases in annual carbon dioxide emissions. That study says the "increase in annual CO2 emissions resulting from the [plan] by 2035" would be "larger than the total national annual emissions today of 82 percent of the countries on Earth."

The committee also flags comments from Consumer Reports dissecting "various flaws" in the Trump administration' claims that the rollback would boost safety.

Further, it also cites research in the journal *Science* that reaffirms internal EPA staff concerns about NHTSA's modeling supporting the plan, including that fatalities per mile driven could actually increase under the proposal compared to the Obama-era standards, the memo notes.

"Who does this rollback help exactly?" asks one source, suggesting that Democrats could base some of their queries on a recent letter from 17 automakers calling for a revised regulation "midway" between the Trump administration's proposed freeze and the current standards.

The question is, "If doesn't help automakers, consumers or the environment" who it is for?

Implicit in such questions — though Democrats might also make the point explicitly during the hearing — is that the oil sector has been a proponent of the rollback because it would hike gasoline consumption.

'Causes Damage'

Safe Climate Campaign's Dan Becker tells *InsideEPA/climate* in line with the memo's critiques that the "rollback causes damage, and hopefully the hearing will explore those damages."

He predicts a yawning gap between the appraisals of the rule by Trump political appointees and Mary Nichols.

Another source following the dispute over the vehicle GHG plan says administration officials will likely combine efforts to defend the proposal with punting on issues related to it by noting that the rule is still not final.

The source also predicts a "blame game" over who is at fault for the lack of a deal between the White House and California that could avert a protracted court fight over the rules.

Lawmakers might focus their queries for Wehrum and King on public documents in EPA's docket — as well as documents House and Senate lawmakers recently requested from the administration — that identify alleged flaws in the plan and point to disregard of EPA staff concerns with the proposal if not fixed in the final rule.

Another possible point of contention is prior Capitol Hill comments by EPA Administrator Andrew Wheeler downplaying the environmental difference between the proposed rollback and the Obama-era rules.

The second source suggests that Nichols — and Democrats' questioning of her — could play a major role in elevating critiques of the Trump plan as boosting uncertainty in regulation and the marketplace.

Nichols will "set the stage," on those issues, the source predicts.

The hearing will also be closely watched for whether it sheds additional light on the timing of a final rule or potential changes to it compared to the proposal. The vehicle plan has not arrived at the White House for inter-agency review, and many sources predict the final rule might not be released until August. — *Doug Obey* (dobey@iwpnews.com)

EPA Eyes Guide On 'Look First' Approach For Transferring Cleanup Duties

Posted June 18, 2019

EPA says it may provide guidance to its regions on facilitating the use of what has been a little-used "look first" approach — where regulators first pursue third parties, such as environmental remediation contractors or real estate investors, after potentially responsible parties (PRPs) transfer their cleanup obligations to them in settlements.

Greg Wall, an attorney in EPA's Office of Site Remediation Enforcement, told a web-based listening session earlier this month that the agency will consider feedback given by outside stakeholders both from the session and through written comment, which was due June 11.

He said the agency then will consider issuing a memo to the regions on the "look first" approach in Superfund settlements.

The "look first" approach refers to a commitment by the federal government to initially pursue cleanup response from a third party who has assumed cleanup obligations at a site, rather than pursuing the settling PRP for failure to comply, offering PRPs a degree of certainty when they enter a settlement, according to an EPA webpage on the listening session.

While EPA already has used the look first approach, it has not been used frequently. But as part of a recommendation in its Superfund reforms, the agency is seeking input from stakeholders on the approach in order to "both further inform and facilitate the use of 'look first' provisions in future settlements, where appropriate and in support of EPA's goals for the Superfund program," according to the EPA webpage.

For the listening session, EPA called for stakeholders to respond to several questions. These included:

- "Do you know of past instances in which a 'look first' provision would have facilitated cleanup and redevelopment of a site?"
- "What kind of sites or settlement agreements are particularly amenable to the 'look first' approach?"
- "What factors make a 'look first' provision more, or less, useful at a site?"
- "Based on your experience, should EPA encourage the use of 'look first' provisions as a tool to facilitate Superfund cleanups, and if so, how?"

During the listening session, EPA heard from just one commenter — the Surplus Property Roundtable (SPR) — which represents mostly Fortune 100 industrial manufacturing companies that manage and dispose of surplus industrial properties.

Scott Sherman, with SPR, made several recommendations. Among them, he suggested EPA adopt additional procedural protections — a buffer — for PRPs. EPA would make clear various steps it would take to work things out with the third party that assumed cleanup obligations, as well as address any shortcomings through the third party's financial assurance.

"I think the [PRP] deserves a little more in terms of process," Sherman said in a follow-up interview. PRPs would love a "look only" provision, rather than a look first one, but they know that is not workable, he said.

Financial Assurance

And Sherman questioned whether the agency is going to tap the financial assurance mechanism first or return to the PRP. If the remediation is more costly than expected and the third party runs out of funds, SPR would want EPA to access

the financial assurance mechanism first, he added.

He also suggested that PRPs be given a role in any dispute resolution process that arises. In the interview, he noted that PRPs may have more insight than the third party into waste streams, waste characteristics and generally have more knowledge about the site.

Sherman also recommended that EPA's application of the look first approach be put in the form of a trilateral agreement that looks more like a "work takeover" agreement rather than a comprehensive Superfund enforcement document. He said during the interview that he could also envision EPA developing a guidance to capture the changes.

Finally, he suggested that EPA form a team, comprised of personnel well-versed in these types of agreements and specifically trained in real estate issues, which would at least initially implement the look first approach.

Larry Schnapf, an attorney expert on Superfund law and brownfields issues, in an interview said he planned to submit comments to EPA suggesting that the agency develop a form that is more amenable to third parties — potentially more like a prospective purchaser agreement. — *Suzanne Yohannan* (syohannan@iwpnews.com)

Court Dismisses Suit Over Title V Air Permit Policy . . . begins on page one

in abeyance pending the D.C. Circuit's ruling on jurisdiction.

EPA announced the permit review policy change in a 2017 denial of Sierra Club's petition for the agency to object to the Title V permit of Pacificorp's Hunter coal-fired power plant in Utah. Title V permits are "umbrella" permits that must include "all applicable" air law requirements, including underlying new source review (NSR) permits.

Sierra Club says EPA must object to the Hunter permit because an underlying NSR permit for the Hunter plant is deficient, allowing the plant to escape tougher "major source" pollution controls that the group says should apply.

The group further says EPA's policy shift is arbitrary and capricious, because it is at odds with the air law and agency precedent and failed to follow public notice-and-comment procedures required for a national rulemaking. They filed suit in the D.C. Circuit claiming the *Hunter* decision set a new national policy on permit reviews.

While prior administrations sometimes considered whether states had required the correct NSR permits, and whether those permits properly applied the correct pollution controls, the Trump EPA in its *Hunter* decision changed course and said the agency may not "second guess" states' permit decisions. This narrow view limits EPA's oversight of Title V permits only to implementation terms, such as monitoring, recordkeeping and reporting of emissions.

In the D.C. Circuit opinion, Judge Judith Rogers on behalf of fellow Judges Nina Pillard and David Tatel says, "Because the Order denying the petition for objection is neither a nationally applicable regulation nor determined by the Administrator to have nationwide scope or effect, venue is not proper in this court."

The court's ruling reflects doubts expressed by the judges at May 1 oral argument over their jurisdiction to hear the suit. But the court does not reach the merits of the EPA policy, leaving the door open to future substantive challenges over other air permits, either in the D.C. Circuit or elsewhere.

Since issuing the *Hunter* order, EPA has relied on the review policy it establishes to deny other petitions for objection to Title V permits, and has cited the doctrine in other litigation involving Title V permits.

Yet the agency in *Sierra Club* insisted that the permit decision at issue was tailored to the unique circumstances of the Hunter plant and did not amount to a "final agency action" with national applicability.

Nor has EPA published a finding of "nationwide scope or effect" for the decision. In the absence of national relevance, Rogers agrees with EPA that the D.C. Circuit lacks jurisdiction.

Sierra Club argues that the *Hunter* decision set new policy and changed the regulatory landscape, but Rogers says the court need not analyze such implications. "The court need look only to the face of the agency action, not its practical effects, to determine whether an action is nationally applicable," she writes.

"On its face, the Order denies Sierra Club's petition for objection to a single permit for a single plant located in a single state. The Order has immediate effect only for the Hunter Power Plant," Rogers says.

'As-Applied' Challenge

However, "If EPA relies on the statutory interpretation set forth in the Order in future adjudications or other final agency action, it will be subject to judicial review upon challenge." Therefore the court leaves open the possibility of an "as-applied" challenge, which would be heard in a regional court of appeals.

"That the interpretative reasoning offered by the Administrator in denying Sierra Club's petition for objection has precedential effect in future EPA proceedings is typical of adjudicative orders, including regionally and locally applicable ones," Rogers writes.

The D.C. Circuit's action leaves litigation ongoing against the *Hunter* order and policy in the 10th Circuit, which has jurisdiction over Colorado, Kansas, New Mexico, Oklahoma, Utah and Wyoming, in a suit also styled *Sierra Club v. EPA, et al.*

Any adverse decision from that court rejecting EPA's policy shift as unlawful would therefore set only a regional precedent in the 10th Circuit states. Under EPA's "regional consistency" policy, the agency can apply different policies in

different EPA regions based on the rulings of the relevant regional courts.

Another suit, *Environmental Integrity Project (EIP), et al., v. EPA, et al.*, is ongoing in the 5th Circuit, which covers Louisiana, Mississippi and Texas. In the suit, EIP and Sierra Club challenge as unlawful the Title V permit of ExxonMobil's Baytown, TX, olefins complex, because the permit lists provisions that environmentalists say are state-only, unapproved by EPA and inadequate to limit pollution.

Environmentalists do not directly challenge the Hunter policy in the suit, claiming that it does not apply because the state permits at issue are not federally "applicable requirements."

Yet EPA's defense of the suit centers on the Hunter policy, which the agency says is a correct reading of the Clean Air Act and rules out interfering with Texas' decision-making on permits.

At June 10 oral argument, judges in EIP appeared to side with EPA. "I thought Title V was simply supposed to put everything in one place, but what the everything is, comes from elsewhere," said Judge Catharina Haynes, indicating that she might rule in favor of the agency's claim that the Title V permit is not reviewable on the state-issued provisions. — *Stuart Parker* (sparker@iwpnews.com).

EPA Approval Of State SSM Waivers Seen As Bid To Evade D.C. Circuit Bar

Posted June 17, 2019

Environmentalists say EPA's issuance of state-specific waivers for industry emissions spikes during startup, shutdown and malfunction (SSM) events in lieu of issuing a final national rule approving such waivers appears to be a bid to evade a U.S. Court of Appeals for the District of Columbia Circuit case that could block such a policy.

EPA's critics say the agency is approving state SSM waivers that would be litigated in the regional circuit court covering the state, rather than in the D.C. Circuit that hears challenges to EPA rules with national applicability. They claim this strategy could lead to some circuits approving the waivers, setting a precedent in all states within that circuit — and avoid an adverse ruling from the D.C. Circuit that has rejected some SSM exemptions in the past.

"This administration, if they had a decision in one circuit that would support their industry-friendly policy, they would apply that to the whole country," says one former Obama EPA official.

In a series of Tweets June 14, John Walke, clean air director for the Natural Resources Defense Council (NRDC) and also a former agency staffer, says the apparent strategy undermines an Obama-era rule that aimed to strip SSM exemption provisions from some states' air plans. He writes that EPA's issuance of state-specific SSM waiver approvals "is unraveling the safer national [Obama rule] & policy, EPA-region-by-region, state-by-state, in a blatant bid to avoid a national rulemaking that would be heard by the D.C. Circuit Court of Appeals."

D.C. Circuit litigation over the Obama EPA's 2015 SSM "SIP Call" rule, banning such exemptions in state implementation plans (SIPs) for attaining federal clean air standards, remains in abeyance pending the Trump EPA's decision on whether to scrap the Obama prohibition on state SSM waivers.

The former agency officials are raising the concerns in response to two agency proposals that would allow emissions limit waivers for air pollution spikes during SSM in North Carolina and Texas. They fear that EPA will pursue such approvals instead of issuing a final SSM national rule subject to D.C. Circuit review.

Industry groups and states in the consolidated case, *Environmental Committee of the Florida Electric Power Coordinating Group, Inc., v. EPA, et al.*, sued EPA claiming the agency had overstepped its authority by disapproving the SIPs of some 36 states. Many states have scrapped the waivers, but some including Texas are fighting the effort.

Agency air chief Bill Wehrum has stated he does not believe that prior D.C. Circuit rulings preclude SSM exemptions, as the prior administration claimed they did. Rather, the Trump EPA is proceeding on the basis that existing D.C. Circuit rulings limit SSM waivers in federal rules, but not in SIPs.

As a result, EPA has now proposed to approve SIPs for Texas and North Carolina containing various waivers. The former EPA officials say this amounts to a shift in national policy without a new national rule.

The first former EPA official says that in fact, the North Carolina proposal confirms a new national policy, and that the Trump EPA intends to impose wherever it can on a piecemeal basis. This is because there is no regional appeals court ruling compelling the approach taken in North Carolina. "I can't see how the argument in the North Carolina situation couldn't be true for any other state," the source says, adding that the theory that EPA is seeking to avoid review in the D.C. Circuit by approving state-specific waivers "totally makes sense to me."

SSM Policy

An EPA spokesperson did not reply by press time to a request for updated information on the agency's intent to publish a national rule on SSM issues in SIPs.

However, EPA in a May 9 status report in the litigation says EPA continues to review its policy, that "this case should continue to be held in abeyance while EPA continues to review the SSM Action, and no action by the Court is required at this time."

The EPA status update does reference the two proposed state SIP approvals, however. On May 20, EPA Region 4,

which covers Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee, released the proposed North Carolina waiver. EPA Region 6, which covers Arkansas, Louisiana, New Mexico, Oklahoma and Texas, proposed the waiver for Texas April 29. EPA is taking public comment on the Texas proposal through June 28, and the North Carolina proposal through August 6.

In a May 24 filing with the court, environmental groups including NRDC, Sierra Club and Environmental Integrity Project note that both the proposals in fact indicate EPA's intent to apply the new policy of allowing SSM exemptions to other states in EPA Regions 6 and 4. EPA's Texas proposal states, "If adopted, the alternative SSM policy regarding affirmative defense provisions being considered in this action would constitute guidance within Region 6 and the Region would apply it to states within this region."

The North Carolina proposal states, "In reviewing the North Carolina SIP revision at issue, as well as . . . other SIP revisions pending in the Region, Region 4 is considering the national policy regarding SSM exemptions in SIPs included in the [SIP Call] . . . and is evaluating whether there is a reasonable alternative way to consider SSM provisions in SIPs that allows such exemptions."

EPA regions under an Obama-era policy upheld by the courts can depart from national policies where doing so would be consistent for a state with the holdings of the relevant regional court of appeals. Hence a ruling from a regional circuit court that differs from the D.C. Circuit would allow a region to request permission to deviate from national policy for a state within the applicable regional circuit.

In its Texas proposal, EPA relies on the 5th Circuit's 2013 ruling in *Luminant Generating Co. v. EPA*, which upheld the legality of "affirmative defenses" for malfunction situations. Affirmative defenses are legal defenses that allow polluters to avoid punishment for malfunctions deemed "unavoidable" by EPA, so long as they have met certain threshold requirements to maintain their equipment.

EPA says that the *Luminant* ruling controls in the 5th Circuit, which covers Louisiana, Mississippi and Texas, and overrides the D.C. Circuit's 2014 ruling in *Natural Resources Defense Council (NRDC) v. EPA*, that found affirmative defenses incompatible with federal courts' authority to fashion penalties for air law violations.

The environmental groups in their May 24 legal filing say that "the states covered by these EPA regions lie in the U.S. Courts of Appeals for the 4th, 5th, 6th, 8th, 10th, and 11th Circuits. Thus, the course the agency appears to have begun exploring raises serious questions about whether the agency may, with centralized approbation, dismantle throughout the country a nationally applicable action on a purportedly piecemeal basis and thereby override Congress's" intent to centralize review of such nationally applicable issues in the D.C. Circuit. — *Stuart Parker* (sparker@iwpnews.com).

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precedent that would apply beyond the single petition at issue in the case.

"[T]he Federal Defendants-Appellants hereby move to voluntarily dismiss their appeal," the filing reads.

EPA's reversal comes just weeks after it formally appealed a March 22 decision by District Judge George L. Russell III, of the U.S. District Court for the District of Maryland. Russell held that the Obama administration improperly rejected environmentalists' petition for broader CWA stormwater permitting in Maryland's Back River watershed by citing other programs it could use to mitigate polluted runoff there.

The CWA requires permits for any stormwater runoff that EPA determines "contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." The agency's authority to make that determination is known as RDA.

Russell agreed with environmentalists that EPA violated the law when it refused to invoke RDA based on a judgment that other pollution-control measures would be as effective as expanding permits, and ordered the agency to craft a new response to the petition. Congress "left no gap in the statute" that would give EPA authority to rely on other programs instead of RDA, Russell wrote.

While the agency's withdrawal of its appeal implies it will abide by the order and revisit the petition, it has not announced a timetable for that work, and declined to comment to *Inside EPA*.

Further, an attorney for environmentalists in the case says EPA has not informed them of its plans. "We don't know what prompted that decision, but we hope to see the agency moving forward soon with implementation of the district court's order."

Court Losses

Blue Water Baltimore was EPA's second district court loss on an RDA petition, following a decision from the Central District of California in August 2018. EPA never appealed that case, *Los Angeles Waterkeeper, et al., v. Pruitt, et al.*, but also has yet to craft its new response to the petition at issue — meaning it is still uncertain how the Trump administration will adjust its approach to stormwater permitting based on the rulings.

But thanks to EPA's decision not to appeal either case, there has been no precedential ruling in environmentalists' favor, leaving the cases limited to the specific petitions that environmentalists filed during the Obama administration. And no similar cases have been filed since President Donald Trump took office, which means there are no prospects for the

groups to win a precedential ruling on the subject in the near future.

Moreover, the two cases rely on slightly different logic, meaning EPA could take different approaches to RDA in the Los Angeles and Baltimore regions.

Judge Stephen V. Wilson, who decided *Waterkeeper*, explicitly ordered EPA to either issue stormwater permits for the contested California properties or prohibit their discharges entirely; but Russell's decision stops short of that step and instead only says the agency should revisit its response to the Back River petition, which leaves open the possibility that it could find the properties do not qualify for RDA at all.

Such a response would be almost certain to trigger another lawsuit. — *David LaRoss* (dlaross@iwpnews.com)

IG Investigates EPA Region 5 Mine Review Seen As Test For Faster Permits

Posted June 13, 2019

EPA's Office of Inspector General (OIG) is investigating complaints that Trump administration officials suppressed Region 5 staff's critical comments on Minnesota regulators' draft Clean Water Act (CWA) permit for a controversial mine, escalating a dispute that is seen as a major test case for the agency's efforts to accelerate permitting.

The OIG's decision to investigate, announced in a June 12 letter to Region 5 Administrator Cathy Stepp, comes the same day as EPA has reversed course in a related Freedom of Information Act (FOIA) lawsuit and released the comments that it had previously withheld, triggering the suit.

But even if the agency's decision brings an end to that federal district court suit, another legal battle over the mine is pending in Minnesota state court, where environmentalists are seeking EPA's critical comments to bolster their permit challenge.

In the state-level litigation, an attorney who worked in EPA's Region 1 office in Boston from 1980-2017 and specialized in the CWA, said this month that Region 5 followed "improper practices" in reviewing the state's draft permit for the PolyMet mine and that the final permit failed to fully address staff's criticism.

The investigation follows separate complaints from retired EPA water attorney Jeffry Fowley and the Fond du Lac Band of Lake Superior Chippewa, alleging that the region's review of the mine permit was inadequate. Although the fight is over a specific mine, it has broader significance as a test case for the Trump administration's push to streamline EPA reviews of state permitting. And it raises questions over the agency's push for "cooperative federalism" that aims to give states more authority over environmental policy.

Fowley and others have urged the OIG to investigate claims that Region 5 political officials suppressed career staff's comments faulting the Minnesota Pollution Control Agency's (MPCA's) CWA National Pollutant Discharge Elimination System (NPDES) water permit for a PolyMet copper-nickel mine near Lake Superior.

Khadija Walker, acting director of the OIG's water directorate, says in the letter to Stepp that the office will audit the region's review of the MPCA NPDES permit, and requests all documents related to the Region's oversight of the permit issued last year. "The OIG's objective is to determine whether the EPA followed appropriate Clean Water Act and NPDES regulations to review the PolyMet permit approved by Minnesota and issued in 2018."

In a June 13 statement to *Inside EPA*, agency spokesman Michael Abboud defends Region 5's review against allegations that political officials squelched staff comments, calling the review consistent with agency practice. "EPA provided the comments and recommendations our regional staff compiled on the proposed PolyMet mine in Minnesota. These comments and recommendations were discussed with the Minnesota Department of Natural Resources, PolyMet Mining Company, and other interested stakeholders as is common practice for the Agency."

Critical Comments

The same day as OIG announced its investigation and request for all documents underlying Region 5's mine permit review, EPA appears to have reversed course and released the allegedly suppressed comments. Environmental group WaterLegacy and others filed a federal district court FOIA suit in a bid to force release of the comments.

EPA had previously rejected a request from Rep. Betty McCollum (D-MN), chair of the appropriations subcommittee that oversees EPA's budget, for the Region 5 staff comments.

In a Feb. 25 letter to EPA Administrator Andrew Wheeler, McCollum requested the comments and said withholding them runs counter to Wheeler's directive from late 2018 to boost transparency, issued in the wake of his predecessor Scott Pruitt's departure.

EPA rejected the request in an April 18 response to McCollum, saying the region's written comments on the draft mine permit were deliberative and subject to ongoing litigation under FOIA.

But in a June 12 joint filing in the FOIA suit, *WaterLegacy v. EPA* in U.S. District Court for the District of Columbia, the parties say that EPA has provided "discretionary release" of the comments that plaintiffs were seeking.

The litigants seek to stay the case and agree to file a joint status report June 27 on whether further litigation is needed.

The comments recently released to plaintiffs are dated early last year and show Region 5 staff raised numerous concerns with MPCA's draft mine permit. The remarks say the draft permit failed to show sufficient analysis was con-

ducted to ensure that water quality-based effluent limitations are adequate to meet state and federal water quality requirements. The comments also raise enforceability concerns with the draft permit.

In a letter addressed to MPCA accompanying the comments, Region 5 NPDES Programs Branch Chief Kevin Pierard commends state officials' progress on the environmental review but cautions that staff concerns "must be addressed to ensure that the permit will achieve compliance" with the CWA.

Failure to address EPA's concerns may result in a federal objection to the state's permit, Pierard says.

Handwritten notes on the document say that EPA staff read their criticism of the draft permit to MPCA officials during a phone call April 5, 2018.

'Improper Practices'

Critics, including Fowley, the band of local Chippewa, and plaintiffs in the FOIA lawsuit, Public Employees for Environmental Responsibility (PEER), have argued that EPA's withholding of written comments on the draft permit precludes public access to the agency input and undermines judicial review by keeping the comments out of the record.

In a June 5 declaration to a Minnesota State Court of Appeals considering advocates' opposition to the mine, Fowley — an attorney who worked in EPA's Region 1 office in Boston from 1980-2017 and specialized in CWA matters — says that Region 5 followed "improper practices" in reviewing the state's draft permit for the PolyMet permit and that the final permit failed to fully address staff's criticism.

"There is no legitimate reason why written comments which could be sent would instead be read over the phone," Fowley says. "The apparent purpose for only receiving such comments over the phone would be to obtain them off the record - to avoid the MPCA receiving written comments which it would then need to be put into the administrative record for the permit and to which it would then need to respond."

Fowley suggests that failure to provide written comments could interfere with judicial review of the permit.

"[O]ne of my concerns is that by not including key information regarding what happened in the administrative record, the MPCA is misleading this Court," the declaration says.

While PEER, in filings in the FOIA case, has alleged the suppression of staff comments may be a symptom of Trump administration efforts to speed permit reviews generally, Fowley's declaration says that he first learned of concerns on the Region 5 review while conducting an inquiry into the administration's effort to streamline state reviews.

In an Aug. 28 letter to then acting Deputy Administrator Henry Darwin, Fowley raised concerns on behalf of the Environmental Integrity Project (EIP) and other advocates that the Trump administration's plan to audit regional offices' reviews of state permits neglected the up-front reviews needed for major permits.

Wheeler memorialized the policy in an Oct. 30 memo to regional officials, "Principles and Best Practices for Oversight of Federal Environmental Programs Implemented by States and Tribes," calling for EPA to defer to state decision-making in most cases but also laying out situations when regulators should intervene to protect human health and the environment.

In his declaration, Fowley says that in discussions with EPA following the letter Darwin, a former director of the Arizona Department of Environmental Quality, who is leading efforts to streamline operations across EPA, requested information on specific permit reviews where greater EPA involvement was needed.

"In response, I interviewed people around the country regarding experiences with recent state permits," Fowley says in his declaration. "While I uncovered concerns regarding other permit reviews (or lack thereof) under the current federal administration, the Poly Met permit presented by far the most serious set of improper practices of all of the cases that I studied." — *Dave Reynolds* (dreynolds@iwpnews.com)

Utilities Concerned PFAS Bill May Set Adverse Precedent . . . begins on page one

But they reiterate their support for the existing Safe Drinking Water Act (SDWA) process for regulating contaminants rather than creating a new approach.

"Ultimately our organizations believe the consistent, science-based regulatory process of SDWA is the best approach for EPA's consideration and development of a drinking water regulation for any contaminant. We believe that any departure from this established process for a particular contaminant or family of contaminants should be minimized and designed in such a way as to avoid placing excessive burdens on EPA while maintaining public transparency," the letter says.

The letter is signed by the American Water Works Association (AWWA), which represents a variety of municipally and investor-owned utilities, and the Association of Metropolitan Water Agencies (AMWA), which represents large municipal drinking water utilities. The groups in the letter say they "hope to have the opportunity to offer constructive suggestions for the proposal as it moves forward."

"We don't want Congress to make a habit of departing" from the SDWA, one drinking water utility source says. "We wouldn't want this [legislation] to be the first of many" bills that set different regulatory processes for different pollutants, the source says.

A second drinking water utility source says that while utilities would prefer the federal government deal with PFAS

using the existing SDWA process, they are also "living in the real world" where there are "a lot of political" and other reasons to address the contaminants more quickly than might occur under SDWA.

At issue is compromise legislation that Barrasso, Carper and Sen. Shelley Moore Capito (R-WV) unveiled last week, filing it as an amendment to S. 1790, the fiscal year 2020 defense authorization bill, which the Senate is slated to begin debating this week.

EPW is scheduled to mark up the PFAS legislation June 19, which could enhance its chances of being included in the defense authorization bill.

Other senators backing the legislation include Dan Sullivan (R-AK), Kirsten Gillibrand (D-NY) and Jeanne Shaheen (D-NH).

An industry attorney says the PFAS bill has "a pretty impressive group of sponsors," another factor that increases the likelihood of passage. "I think it has a chance. I would take this pretty seriously," the attorney says.

"I think the hard part's been done" by getting key bipartisan senators to reach a deal, a rural water utility source says of the bill's chances. "Everything else is going to line up. Everybody's going to want this to move through."

The rural utility source supports many of the bill's provisions, especially targeted funding for communities most in need and providing a safe harbor from enforcement while small and rural utilities move to address PFAS.

House Action

While it is unclear how the House may want to address PFAS, the rural utility source notes there is precedent in last year's water resources development act for a Barrasso-brokered bipartisan deal to drive House action. Titled America's Water Infrastructure Act, that legislation reauthorized EPA's drinking water state revolving loan fund at higher levels than when the program was last authorized 16 years ago following negotiations between key lawmakers on EPW and two House committees.

The PFAS bill contains several measures directing EPA to take a variety of actions. These include:

• Setting a primary drinking water regulation that includes standards for at least two of the most prevalent PFAS — perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS) — within two years and creating an expedited process to set standards for other PFAS.

• Imposing new drinking water monitoring requirements.

• Adding PFOA, PFOS and other PFAS listed as an active chemical substance under section 8(b)(1) of the Toxic Substances Control Act (TSCA) to the Toxic Release Inventory (TRI).

• Issuing a section 8(a) data call under TSCA to PFAS manufacturers on their PFAS production since 2006.

• Finalizing a 2015 Significant New Use Rule on long-chain PFAS under TSCA.

• Issuing guidance on methods to dispose and destroy PFAS, including firefighting foam.

• Implementing monitoring and detection measures for PFAS, and nationwide sampling for the substances.

• Suspending financial penalties for violations of the drinking water regulation within five years of its promulgation.

• Allowing drinking water state revolving funds to address PFAS, including a set-aside for small and disadvantaged communities.

• Further examining the effects of PFAS on human health and the environment.

Notably, the bill does not contain language that would require the agency to list any PFAS as hazardous substances under the Superfund law — a measure the agency is pursuing administratively that would trigger Superfund liability for releases of the chemicals, aiding regulators and communities in cleaning up contamination and recovering costs from responsible parties.

The industry attorney says the lack of Superfund "hazardous substance" language in the bill is significant, although it is unclear why it was left out. The senators may believe it is a decision better left for EPA to address administratively, may seek to address it later or may not have been able to reach agreement on it, the attorney says.

While utilities are cautiously concerned with the legislation, state environmental officials — who have pressed for aggressive action on PFAS — may be more concerned.

Northeast officials, for example, had urged EPW in a June 10 letter to include a Superfund hazardous substance listing in the bill as well as to require EPA to regulate PFAS as a class rather than on a chemical-by-chemical basis.

And the Environmental Working Group (EWG) also urged policymakers to list PFAS as a "hazardous substance," one of several issues they said still needs to be addressed. "We need to designate PFAS as a 'hazardous substance' to kickstart the cleanup process in the places with the worst PFAS contamination," EWG Senior Vice President for Government Affairs Scott Faber said in a June 14 statement.

Tight Timeline

Industry and state sources also say the legislation's requirement that EPA regulate PFOA and PFAS within two years may be challenging for the agency. "We like the idea of expeditious [regulatory] proposal," a state source says. "But two years are pretty tight."

"That's going to be a rush," the industry attorney says of the two-year timeline. "If they don't do it right, it's still subject to [legal] challenge."

In addition to requiring a PFOA and PFOS standard, the bill would require EPA within 18 months of other PFAS

being placed on the agency's contaminant candidate list to determine whether those PFAS require an enforceable standard, potentially establishing an ongoing cycle of regulatory determinations for a series of PFAS, AMWA sources say. If EPA determines regulation is necessary, the agency would be required to propose the standard within 18 months and finalize it within one year after that, a quicker timeline than SDWA applies to other contaminants.

Furthermore, the bill would require EPA to issue a lifetime drinking water health advisory for any PFAS or class of PFAS for which EPA finalizes a toxicity value and testing procedure, unless EPA determines the substance is unlikely to appear in drinking water.

The rural utility source says the health advisory language "gives EPA some authorities to do what they've been doing" in addressing emerging contaminants through health advisories, which are not binding but can be issued more quickly than developing a regulation.

But the second water utility source says the health advisory language is concerning because it would allow EPA to issue the advisories without public notice and comment.

However, all the water utility sources are pleased the bill does not mandate the regulation of PFAS as a class.

In addition to mandating EPA action, the bill also calls for the White House Office of Science and Technology Policy (OSTP) to coordinate with EPA and several other federal agencies to establish the National Emerging Contaminant Research Initiative to improve the identification, analysis, monitoring and treatment methods of contaminants of concern.

The industry attorney says it is interesting that the Food and Drug Administration is not among the agencies specifically listed in the bill but notes the provision allows OSTP to include "any other Federal agency that contributes to research in water quality, environmental exposures, and public health." — *Lara Beaven* (lbeaven@iwpnews.com)

EPA Advisors Urged To Weigh Data For Key TSCA Risk Finding On PV29

Posted June 17, 2019

Environmentalists are urging EPA science advisors ahead of their upcoming meeting to examine whether the agency provided adequate data for its draft conclusion that pigment violet 29 (PV29) does not pose unreasonable risk, stepping up their long-running effort to challenge EPA's first assessment of an existing chemical under the revised toxics law.

In June 11 comments to EPA's Science Advisory Committee on Chemicals (SACC), which is slated to meet June 18-21 to review the agency's draft assessment of PV29, several groups charged that the draft assessment is fatally flawed, in large part because they believe EPA has insufficient information to reach the mandatory determination.

"Our overriding concern about EPA's charge to the SACC is that it does not include a dedicated question on the adequacy of the information that EPA relies on in to reach its proposed risk determination," the group's comments state.

"We believe that the SACC should be specifically asked, separate from its other charge questions, whether the information cited in the draft risk evaluation is sufficient to fully evaluate PV29 and support a finding of no unreasonable risk, and, if not, what additional information EPA should obtain prior to the finalization of the risk evaluation."

Groups signing the letter include Safer Chemicals Healthy Families, Center for Environmental Health, Earthjustice, Environmental Health Strategy Center, and Natural Resources Defense Council.

The groups are among those who protested when the Trump EPA released the draft assessment last fall with summaries of the studies it relied on in its draft determination, while declining to release the full studies as many argue the Toxic Substances Control Act (TSCA) requires the agency to do.

They charged the approach was unlawful and urged EPA to withdraw the draft assessment, acknowledge that more information is needed to adequately assess PV29's toxicity and use its expanded test order authorities to generate more information about the chemical.

EPA later reversed its position under toxics chief Alexandra Dunn and released redacted versions of most of the studies.

But the groups maintain that EPA is still withholding too much data — and what has been used is too scant to reach any conclusion on PV29's toxicity. Adding to their concern, the groups are also highlighting that EPA recently downgraded the quality of inhalation studies it had relied on in its assessment, underscoring their concerns with the agency's risk finding as well as its "systematic review" approach the agency used to prioritize various studies.

Pointing to PV29's heightened status as the first draft assessment EPA has released since TSCA's 2016 reform, the groups argue, "[p]robing and thorough peer review by independent experts is particularly important for EPA's first risk evaluation because it will set precedents for later evaluations."

In general, the groups say they have "serious questions about the absence of credible data on multiple key health endpoints; EPA's sole reliance on personal communication with a chemical manufacturer in lieu of available workplace monitoring and environmental release data; and EPA's calculation of risk based on a screening study that — according to OECD Guideline and EPA risk assessment guidelines — cannot be used as the basis for a risk determination." The groups

urge SACC to address these issues in their review, noting various points at which they find EPA's charge to the committee lacking.

Worker Safety

Earthjustice, in separate May 17 comments with OSH Law Project, describes in more detail their concerns with the limited information available that is the basis for EPA's draft assessment. As one example, they write that concerns about the exposure information EPA uses in the assessment — largely gleaned from correspondence with a scientist at Sun Chemicals, the sole producer of PV29 in the U.S. — raise concerns for worker safety.

"The deficiencies in EPA's draft risk evaluation present the greatest threat to the workers who manufacture, process, and use PV29. If EPA lacks the information required to determine how much PV29 those workers are exposed to, or what the acute and chronic effects of such exposure will be, then EPA cannot ensure those workers and other potentially exposed and susceptible subpopulations will be protected from unreasonable risk."

The groups argue "TSCA requires EPA to use its information gathering authority to fill the gaps that remain in its PV29 dataset, to incorporate additional exposure and toxicity information into a revised risk evaluation, and to publish the revised draft and all of the underlying data for public review and comment."

Earthjustice and the labor law group note that EPA's draft assessment cites email communications between EPA staff and a Sun Chemical scientist regarding levels of PV29 that the company's employees are exposed to, and that these communications are the basis for EPA workplace exposure calculations.

The groups note that "if Sun Chemical had conducted actual exposure monitoring, [Occupational Safety and Health Administration (OSHA)] regulations require that the company retain that data and, it would have been available to EPA had the agency requested it."

The groups maintain that based on records they received through public records requests, EPA used the company's "unsubstantiated assertion to calculate not only PV29 exposure levels for all Sun Chemical employees but also for all other worker exposures to PV29 as well, including downstream users of paints and products containing PV29 that face very different routes and concentrations of exposure."

They say EPA's reliance on an email from Sun Chemical in lieu of available exposure data violates TSCA's requirements to utilize the 'best available science' and 'reasonably available information' in TSCA risk evaluations."

The groups also criticize EPA's use of human health data, arguing that its release of additional information about the studies in March "reveals that EPA has even less information than previously thought."

The groups note EPA's finding of no adverse effects from exposure to PV29 by any route of exposure, adding that "EPA has since acknowledged both of the studies on PV29 inhalation are 'unacceptable' and cannot be used in the risk evaluation because they 'were not designed for non-volatile substances, such as aerosols of respirable particles as would be expected for PV29,'" according to a memo from EPA's toxics office to SACC staff in April, transmitting the studies and charge. The charge has since been updated with a June 6 transmittal memo.

Still, the groups argue, the situation "leaves EPA with no reliable data on the inhalation risks of a chemical that can be applied as a spray — a significant gap that precludes a determination of no unreasonable risk."

The groups say the SACC "should be asked whether or not the data in the draft risk evaluation provides enough information to justify EPA's proposed conclusion" on PV29's potential health risks.

Systematic Review

The Environmental Defense Fund (EDF) in its May 17 comments argues that the downgrading of the two inhalation studies "illustrates a "monumental deficiency" in the agency's application of the TSCA systematic review method that EPA's TSCA program has created and is implementing for PV29 and the other nine chemicals in the first 10 undergoing review in the new program.

EDF says the agency should have instead adopted an existing method, such as those published by academic groups, or one crafted by another federal office or agency, such as those developed by the National Institute for Environmental Health Sciences or EPA's Integrated Risk Information System (IRIS).

EDF notes that the two inhalation studies were initially graded as of medium quality, but after review, were deemed unacceptable for use, as were other toxicology studies EPA considered on other endpoints. EDF notes that some even dropped from an original rating of high quality to unacceptable. "[T]hat a study metric was initially scored High when it should have been scored Unacceptable raises additional alarm bells around whether [EPA's toxics office] has the appropriate expertise and objectivity to appropriately evaluate study quality."

EDF adds that EPA's staff must be properly equipped to do the systematic reviews "and given the scientific independence to conduct robust evaluations of study quality — a need that will become even more imperative in the next set of draft risk evaluations where the evidence base is substantially more voluminous."

And it reiterates long-standing calls for the National Academy of Sciences to assess its systematic review method, an assessment the academy is already slated to conduct.

By contrast, the Color Pigments Manufacturers Association, Inc. (CPMA) in May 17 comments defends EPA's data and conclusions and makes a series of arguments aimed at limiting any future regulation.

For example, it argues that existing OSHA standards "adequately restrict reasonably foreseeable worker exposures."

CPMA notes that OSHA's rules require manufacturers to use engineering controls whenever feasible.

The group adds that for members and customers working with PV29, often "their engineering or work practice controls are actually driven by other materials that are subject to more restrictive" workplace exposure standards.

CPMA also argues that American workers exposed to PV29 do not constitute a "vulnerable subpopulation" for whom TSCA requires special protections, adding that there is only one domestic manufacturer of this product, at one facility. "There is no indication that the very limited number of workers potentially exposed to [PV29] are exposed above the existing regulatory limits," CPMA says. —*Maria Hegstad* (mhegstad@ipwnews.com)

EPA's PFAS Groundwater Guidance Draws Wide-Ranging Criticisms

Posted June 14, 2019

EPA's interim draft guide for addressing per- and polyfluoroalkyl substances (PFAS) in groundwater is drawing wide-ranging criticisms, with environmentalists charging it is too weak, industry questioning its scientific basis and the agency's procedures in developing it and states charging it does not adequately preserve their requirements.

"Unfortunately, the draft Guidance suffers from serious deficiencies in the underlying scientific analysis and associated science policy decisions, and in EPA's failure to comply with requirements for independent peer review, analysis of policy options, public comment, and several other statutory and Executive branch procedural requirements applicable to significant regulatory actions," the industry-backed Responsible Science Policy Coalition (RSPC) says in June 10 comments to EPA.

At the same time, the environmental group Natural Resources Defense Council (NRDC) complains the guidance fails in other ways — saying it does not comply with key requirements of the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA) and Resource Conservation & Recovery Act (RCRA) as well as CERCLA's regulatory blueprint, the National Contingency Plan (NCP) because it does not meet the requirements for sufficiently protecting public health, particularly sensitive subgroups.

The group says "research shows that PFAS exposure poses a high risk to vulnerable populations, such as fetuses, infants, children, nursing mothers and persons with certain preexisting conditions." But the agency fails to properly account for these vulnerabilities and exposures in its analysis for the guidance's recommendations, and the proposed PRG and screening levels will fail to protect these sensitive groups within safety parameters, it says.

And in recently filed comments, at least one state, Massachusetts, is suggesting the agency should abandon its "outdated" approach to applying state standards — known as applicable or relevant and appropriate requirements (ARARs) — to cleanups, and apply a "more expansive approach" that allows using state-established criteria as preliminary remediation goals (PRGs) for cleanups.

In particular, Massachusetts says EPA should update its approach to recognize innovative state approaches to "environmental assessment and cleanup that do not meet the outdated definition of ARARs." EPA should at the least adopt state and local criteria as screening levels under CERCLA, and should consider state criteria as PRGs.

The criticisms suggest the agency is likely to face legal challenges to the policy, though petitioners would likely face a high bar as they would have to demonstrate the interim measure has concrete effects and is subject to judicial review — even though it is not a final rule.

The comments respond to EPA's draft interim guidance aimed at addressing groundwater contaminated with perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) — two of the more common chemicals in the vast class of PFAS. EPA took public comment on the document until June 10.

The policy is one of several the agency is developing to address PFAS, a class of thousands of persistent, toxic chemicals known for their non-stick qualities that have drawn significant public scrutiny and calls for regulation after being discovered in drinking water supplies around the country. The chemicals have been linked to adverse health effects including certain cancers, thyroid conditions and other issues.

The document has drawn controversy since its release after EPA dropped a default threshold above which regulators could order removals, sparking charges that regulators may not pursue some cleanups because they will be harder to justify — though EPA says the limit was dropped to avoid confusion.

Cleanup Levels

The draft guide proposes applying a PRG of 70 parts per trillion (ppt) to "inform" final cleanup levels in cases where groundwater is being used as a source of drinking water — a level that matches EPA's non-enforceable lifetime health advisory level for the two chemicals, combined, in drinking water. PRGs are set for an exposure route at the contaminant concentration that is believed to provide adequate protections based on preliminary site data, the guide says.

The agency also says 40 ppt should be used as a "screening level" to identify sites with groundwater contamination that may warrant further investigation. That level was driven by non-cancer risks, although it will be protective of the cancer endpoint as well, EPA points out.

The screening level, in considering non-cancer effects, uses a hazard quotient (HQ) of 0.1 for PFOA or PFOS

individually, a stricter level than EPA typically uses for screening for single contaminants. This is partly because of the additive toxicity of the two chemicals and the possibility that other PFAS that may be toxic may be co-located at the site.

But industry takes EPA to task for proposing to set the PRG at the same level as the drinking water health advisory and for the decisions surrounding the screening level.

"[I]t is clear that USEPA's reasoning in developing its proposed screening level . . . and [PRG] for groundwater contaminated with [PFOA and PFOS] is deficient, not based in sound science, and is arbitrary and not in compliance with administrative procedures and law," says Laurie Matthews, an attorney representing the Superfund Settlements Project (SSP) and RCRA Corrective Action Project (RCAP), in June 10 comments. SSP represents companies from various industry sectors, while RCAP represents companies that advocate for cost-effective cleanups.

SSP and RCAP say EPA ignores how cleanup criteria are set under CERCLA. Specifically, they say that any application of health advisory levels to develop cleanup criteria should be "as an input into the risk assessment process, which we understand would increase the PRG by almost a factor of six."

SSP and RCAP also argue the HQ of 0.1 that EPA used to set the screening level is not justified. They say EPA lacks a basis to claim that both chemicals will always be present and that therefore their toxicity is always additive.

The two groups also question using the agency's drinking water health advisory for PFOA and PFOS as the PRG, as the advisories are not enforceable regulations. "By identifying the [health advisory] as the PRG, USEPA is essentially making informal guidance enforceable."

They say, "Such action is contrary to the requirements of the Administrative Procedure Act and contrary to this Administration's commitment to rein in informal guidance that is being used as regulation."

SSP and RCAP and, in separate comments, RSPC also disparage EPA's health advisory — saying it relies on discredited studies and lacks an independent peer review.

RSPC says the groundwater guidance cannot be using the best available science if it relies on the agency's 2016 scientific analysis and policy decisions that underlie the reference doses (RfDs) and health advisories developed in 2016. The group notes there have been more than 100 new, published studies since that time on potential human impacts from the two chemicals. Further, RSPC questions many of the science policy choices EPA made when establishing the RfDs that underlie the 2016 health advisories.

And it takes issue with EPA's application of the 2016 RfDs to the guidance, saying it departs from EPA remediation policy. Using EPA's standard exposure parameters would have resulted in a PRG much higher — at 380 ppt — it says.

RSPC advises EPA to correct "serious deficiencies" and publish a new draft for public comment.

Vulnerable Populations

In contrast, NRDC argues EPA's draft guidance fails to meet regulatory requirements for protecting public health. In particular, the draft document's "screening and cleanup levels fail to ensure the protection of vulnerable populations, such as developing fetuses and young children, from adverse effects such as immune system disruption, altered mammary gland development, hormone disruption and decreased birth weight."

The group instead recommends a screening level and PRG of 2 ppt for PFOA and PFOS combined.

NRDC also argues that multiple PFAS are probable carcinogens, and says "exposures often occur as a complex mixture of PFAS." It says factoring in certain safety factors and considering the likelihood of additive effects from exposure to possibly multiple PFAS leads it to advise a health-based drinking water level of zero for the two chemicals.

In its June 10 comments, Environmental Working Group (EWG), which has long pushed for more stringent regulation of PFAS, advises EPA to apply reference dose data based on the latest toxicology research rather than on an "already outdated" 2016 drinking water health advisory, reiterates calls for designating the entire class of PFAS as "hazardous substances," and calls for setting the PRG and screening levels based on total concentration for the sum of all PFAS at a site.

Minnesota's Pollution Control Agency and Department of Health in combined June 4 comments argue EPA should instead address the most pressing need regarding PFOA and PFOS — which is to list these and other PFAS as hazardous substances subject to CERCLA liability.

In their comments, they contend such a move would give EPA a regulatory basis to address PFAS-contaminated groundwater at both CERCLA and RCRA sites. They also push for EPA to set enforceable drinking water standards — something many lawmakers, environmental groups and others have sought.

States in their comments are also looking to ensure their groundwater authorities are fully supported. For instance, Minnesota notes that its health-based rules for PFOS and PFOA are more stringent than the draft PRGs, and tells EPA its groundwater guidance "should explicitly recognize that guidance values set by states, even if lower than values developed by EPA, constitute applicable or relevant and appropriate requirements."

In addition, Massachusetts Department of Environmental Protection contends in June 7 comments that EPA should move beyond its traditional EPA policy approach it uses here — "which is proving inadequate to effectively address a national issue involving a unique family of contaminants." — *Suzanne Yohannan*

EPA Finalizes Narrow Power Plant GHG Rule . . . begins on page one

"I believe this is the first rule in [the Trump] EPA's history that acknowledges the existential threat of climate change but by the agency's own admission does absolutely nothing to stop it," Obama EPA Administrator Gina McCarthy says in a statement.

Still, EPA says the rule will cut GHGs from coal plants by 10 million tons per year when fully implemented, but critics are already questioning these projections, arguing in part that a still-pending policy that could allow coal plants to run more often without strict permitting requirements could boost both GHG and criteria pollutants.

However, EPA and other Trump administration officials, along with Republican members of Congress, offered strong praise for ACE, charging that the CPP exceeded the agency's statutory authority and criticized renewable energy as unreliable. "Unlike the Clean Power Plan, the ACE rule adheres to the four corners of the Clean Air Act," Wheeler said during a June 19 address at agency headquarters announcing the final rule.

ACE will continue to achieve environmental progress "and will do so legally and with proper respect for the states," he said. He also noted that repealing the CPP was one of President Donald Trump's top priorities. "We are gathered here today because the American public elected a president with a better approach, and today we are fulfilling his directive."

Wheeler added that the "importance of reliable, affordable energy cannot be overstated."

EPA repeated prior claims that the rule would result in power sector GHG cuts by as much as 30 percent in 2030, a figure that includes business-as-usual market trends. Wheeler also said the rule will result in annual net benefits between $120 million and $730 million when fully implemented, and will reduce sulfur dioxides, nitrogen oxides and particulate matter, as well as GHGs.

Unlike the CPP, which defined the best system of emissions reduction (BSER) as generation shifting from coal to lower-emitting natural gas and renewables, ACE narrowly defines BSER as a set of technologies that improve efficiency at coal plants, directing states to consider requiring such technologies as they set standards of performance for individual plants.

But the rule does not set a presumptive standard of performance, according to Wheeler, which is a rebuff to state requests for such language. They urged EPA to provide more details about what was required to protect them from lawsuits challenging whatever requirements they impose on individual power plants.

The rule will give states three years to submit a compliance plan outlining what its coal plants must do, and then gives EPA one year to approve those plans. In order to set these timelines, ACE also changes the agency's framework regulations under section 111 of the Clean Air Act, to align with the deadlines in other parts of the statute that require states to submit state implementation plans.

'NSR Fix'

As expected, the final rule drops a proposal that would essentially exempt coal plants from having to undergo new source review (NSR) permitting, a plan EPA says is crucial in order to allow plants to complete the necessary efficiency upgrades to comply with ACE.

However, as expected, those changes will be finalized separately in a few months and should not affect state plan development, given the long time horizon, a senior EPA official explains.

"We fully intend to finalize the NSR fix, but frankly with everything we have in the final rule, we've bitten off as much as we can chew and our judgment was" that is it best to complete the ACE rule and then follow up with the NSR piece, the official says.

The official explains that the framework regulations are being revised to "make it abundantly clear that we as the federal government identify the best technology, the states develop the standards, and we review and approve. The Clean Power Plan was way too federal heavy, and this part of the ACE rule will rebalance" those roles.

The third part of ACE, what the official calls the "guts" of the rule, is the BSER determination, which is based on efficiency improvements within a plant's fenceline when considering the remaining useful life of the facility and other factors. As part of the BSER definition, the agency considered and rejected other technologies such as carbon capture and sequestration, and co-firing with natural gas.

Further, the official says EPA considered and rejected any kind of trading for ACE compliance, meaning states that have existing carbon trading programs will still need to assess other measures for their coal plants to comply with the rule.

In comparing the ACE rule requirements to the CPP, the official says, "I don't see this as a scaling back. I see this as a correction. Scaling back suggests what the Obama administration did was good and valid, and that's not how I see it at all." But the official adds that this administration cannot limit what a future administration can do.

But McCarthy, the former administrator, says the agency's projections about emissions cuts — including its claim that the rule will reduce GHGs by 10 million tons annually and cut a range of conventional pollutants — rely on "current energy projections and heartfelt promises to address carbon dioxide."

EPA's plan to "relax long-standing permitting requirements will allow coal plants to pollute more — throwing projections of [GHG] reductions out the window and increasing air pollutants that turn back progress. The small amount of carbon reductions from this rule will soon disappear when the changes to [NSR] kick in and more pollution follows," McCarthy adds. — *Dawn Reeves* (dreeves@iwpnews.com)

OTC Urges EPA To Accelerate Development Of Stricter Truck NOx Air Limit

Posted June 12, 2019

WILMINGTON, DE — The Ozone Transport Commission (OTC) of 12 Northeastern and Mid-Atlantic states is urging EPA to accelerate its development of a tougher limit for ozone-forming nitrogen oxides (NOx) emissions for new heavy-duty trucks, seeing the rule as vital to the region's efforts to attain federal ozone air standards.

At OTC's June 11 annual meeting here, air regulators from member states said that stricter EPA NOx rules for trucks are just one of many state and federal measures they need to attain the ozone national ambient air quality standards (NAAQS). They also want EPA to craft ozone air transport policies, and Maryland is asking OTC to back its call for the agency to regulate stationary ozone sources in fellow member state Pennsylvania.

Some states continue to struggle meeting the 2008 ozone NAAQS of 75 parts per billion (ppb), and must also craft plans to meet the even-stricter 70 ppb limit set by the Obama administration in 2015.

OTC has focused mainly on stationary sources, especially power plants, in its quest for ozone reductions because states have some authority to regulate those beyond EPA regulations. But the group is now increasingly looking to mobile sources like cars and trucks for reductions in NOx, and calling for the agency to act because the air law largely preempts states from regulating mobile emissions source sources.

After years of pressure from OTC states, California and others for a tougher NOx standard, the Trump EPA last year announced its Cleaner Trucks Initiative - a plan to update outmoded emissions standards as the share of NOx emitted by heavy trucks continues to grow relative to other sectors. Trucking continues to grow as freight volumes increase, even as other major sources of NOx such as power plants are seeing dramatic reductions in emissions.

OTC Chairman Shawn Garvin, Delaware's top environment official, said at the meeting that the group is drafting a letter to EPA that will press the agency to hurry its development of a new heavy-duty NOx rule.

George Aburn, air director for Maryland and chairman of OTC's mobile sources committee, said mobile sources are "a huge area where we need to make progress," and that the heavy-duty truck rule is OTC's "highest priority by far" in this area. "It is a big deal."

Aburn said the forthcoming OTC letter will stress the need for continued regional NOx cuts; the need for strong and timely standards; the need for federal leadership; and the need for collaboration with states, industry and others.

He noted that California is already forging ahead with its own heavy truck NOx rule under its unique Clean Air Act authority to craft emissions standards tougher than federal rules, and that several East Coast states already adhere to California's vehicle emissions rules and should be able to adopt whatever the state issues.

But "we really need a harmonized program, we need a program that works for all trucks," he said.

Aburn added that a new truck NOx rule would complement federal measures OTC wants EPA to take to update standards for "aftermarket" catalytic converters, which would achieve significant NOx reductions from older vehicles. EPA is now working to update its policy on vehicle emissions control tampering, in order to allow sales of cheaper, but effective, aftermarket catalytic converters.

Uncertain Timeline

However, addressing the OTC meeting, EPA senior air official Anne Idsal could not specify a definitive timeline for development of a final rule.

Idsal told *Inside EPA* at the event that EPA plans to begin technical studies on a new standard in earnest this fall. This would suggest a proposal at the earliest in 2020 and a final rule in 2021, likely after President Donald Trump's first term, sources say.

In 2016, the California South Coast Air Quality Management District, representing greater Los Angeles, along with other state and local air agencies, petitioned EPA to set a new federal NOx standard at 0.02 grams per brake horsepower-hour (g/bhp-hr). This would represent a 90 percent cut in NOx emissions from current standard of 0.2 g/bhp-hr).

Speaking at the OTC meeting, Michael Gellar, deputy director of the Manufacturers of Emissions Controls Association, said that EPA is already behind California's timeline for a new rule. California is currently looking at a two-step process, which could result in a 0.05 g/bhp-hr standard applicable in 2024, and a tougher standard in 2027 that could be 0.02 g/bhp-hr or some other stringent limit, Gellar said.

Gellar said EPA is on track to set a new standard that would apply from 2027. Should that standard be set at 0.02 g/bhp-hr it would be achievable at a cost of between $1000 and $5000 per ton of NOx removed, a reasonable sum, he suggested. Achieving NOx cuts at the more stringent end of the spectrum would require a "systems-based" approach that would include cleaner fuels, more efficient engines, advanced aftertreatment systems and electrified powertrains, he said.

The NOx cuts could be achieved without compromising vehicles' GHG emissions performance, and all GHG standards currently "on the books" could be met, Gellar said.

The suggested California interim standard of 0.05 g/bhp-hr could be met "without major changes to aftertreatment designs," meaning the standard would be economically attained, Gellar said.

One unknown factor that could affect EPA's eventual truck standard is the departure of Chris Grundler, head of the

Office of Transportation and Air Quality, which is responsible for developing vehicle standards. Grundler is swapping jobs with Sarah Dunham, taking her position as director of EPA's Office of Atmospheric Programs, which has responsibility for greenhouse gas issues, among others.

Grundler has emphasized the importance of achieving emissions reductions from the large fleet of in-use vehicles because the impact of new truck emissions standards applicable only to new trucks would be limited, sources note. — *Stuart Parker* (sparker@iwpnews.com)

EPA Seeks Reviewers For Controversial Methods Of Estimating PM Benefits

Posted June 12, 2019

EPA is seeking experts to peer review potential new approaches for estimating the benefits of reducing fine particulate matter (PM2.5) below national standards, an effort that could help the agency justify planned rollbacks of Obama-era rules governing power plant emissions of mercury and greenhouse gases that relied on the "co-benefits" provided by the PM2.5 reductions.

According to a *Federal Register* notice scheduled for publication June 13, the agency is seeking experts in epidemiology, biostatistics, cost-benefit analysis, uncertainty analysis and economics to peer review its pending document, titled "Potential Approaches for Characterizing the Estimated Benefits of Reducing PM2.5 at Low Concentrations."

The document suggests the agency plans to investigate in part uncertainties associated with PM2.5 exposures at low concentrations. While EPA has in the past assumed benefits from reductions at low concentrations, "because of the absence of data at such low concentrations, there is greater uncertainty about the likelihood of health effects, including premature death," the notice says.

"The degree of uncertainty associated with premature deaths estimated at these lower levels has over time taken on greater prominence, due in part to decreasing ambient PM2.5 concentrations, the public health importance of PM2.5-associated mortality, and the magnitude of the economic value of the effect. As a means of improving its methods for quantifying and characterizing effects estimated at these lower PM2.5 levels, the Agency is developing and evaluating potential alternative approaches for estimating these effects," it says.

The Trump administration has been seeking to drop EPA's long-standing practice that has counted additional or "co-benefits" of avoided deaths and illness caused by PM2.5 and other air pollution in its rules — even if those rules, such as the Clean Power Plan and the Mercury and Air Toxics Standards — were not specifically targeting those pollutants.

Supporters of this approach have long argued that EPA cannot count such benefits because separate national ambient air quality standards (NAAQS) exist to regulate PM2.5 and other criteria pollutants. They add that the benefits below the standards also cannot be counted because under the Clean Air Act, EPA must set NAAQS at a level requisite to protect public health with an "adequate margin of safety."

Discounting the PM2.5 benefits below the level of the NAAQS has a huge impact on the estimated impact of air rules, because the vast majority of the country is attaining the standard already and most exposures occur at lower concentrations than the NAAQS. This is critical for MATS in particular, where the great majority of the benefits the Obama EPA estimated stemmed from co-benefits.

But critics charge the approach is unlawful and will allow emissions to increase, a concern since there is no safe exposure threshold for PM2.5.

The approach has already drawn significant controversy after EPA air chief Bill Wehrum said recently that the agency would use its new approach in the analysis of its Affordable Clean Energy (ACE) rule, which seeks to roll back the CPP.

EPA later clarified that the approach will not be used in the ACE rule's cost-benefit analysis, adding in a statement that the "longstanding and important question is how much benefit is derived by further reducing ambient levels below the [NAAQS]. We are considering changes to how such benefits are calculated. No changes to this scientific method will be made unless and until the new approach has been peer reviewed."

Two Alternatives

EPA's new notice describes the agency's existing practice as "us[ing] evidence from long-term exposure cohort studies to estimate the number of PM2.5-related premature deaths and morbidity effects in its air pollution benefits analyses. Generally, . . . EPA quantifies effects for the full distribution of ambient PM2.5 concentrations, including at concentrations below the lowest measured levels (LML) of these studies; this reflects the current scientific evidence, which does not find a threshold in the concentration-response relationship."

EPA's report will consider two different alternatives to existing practice, according to a synopsis for the pending paper, posted to EPA's website June 7.

It says the two alternative approaches in the paper will infer "the uncertainty at concentrations below the mean concentration and LML of the long-term exposure epidemiology studies by employing statistical techniques" using "studies that examined long-term PM2.5 exposure and mortality within the American Cancer Society (ACS) cohort." — *Maria Hegstad* (mhegstad@iwpnews.com)